

TESTIMONY OF THE HONORABLE LOUIS STOKES

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

COMMITTEE ON GOVERNMENT OPERATIONS

AUGUST 3, 1988

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE,  
AND THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU IN  
SUPPORT OF H.R. 5092, THE PRESIDENTIAL DIRECTIVES AND RECORDS  
ACCOUNTABILITY ACT.

I WILL CONFINE MY REMARKS TO SECTION 2 OF THE BILL WHICH  
WOULD REQUIRE THAT ALL "EXECUTIVE DIRECTIVES" ISSUED BY THE

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PRESIDENT BE FILED WITH THE OFFICE OF THE FEDERAL REGISTER AND IMMEDIATELY PROVIDED TO THE APPROPRIATE COMMITTEES OF THE HOUSE AND SENATE. I AM INTERESTED IN THIS LEGISLATION BECAUSE IT WOULD REQUIRE FOR THE FIRST TIME THAT SO-CALLED NATIONAL SECURITY DECISION DIRECTIVES BE PROVIDED TO CONGRESS.

AS I UNDERSTAND IT, MR. CHAIRMAN, EACH PRESIDENT PROMULGATES A NUMBER OF CLASSIFIED DIRECTIVES DURING HIS ADMINISTRATION, WHICH HAVE BEEN VARIOUSLY TERMED PRESIDENTIAL DIRECTIVES (PDs), NATIONAL SECURITY DECISION MEMORANDA (NSDMs), NATIONAL SECURITY DECISION DIRECTIVES (NSDDs), ETC. THE ESSENCE OF THESE DOCUMENTS IS THAT THEY REPRESENT POLICY PRONOUNCEMENTS AND INSTRUCTIONS TO EXECUTIVE BRANCH OFFICIALS

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ON HOW TO IMPLEMENT VARIOUS POLICY DECISIONS IN THE NATIONAL SECURITY ARENA. THESE DOCUMENTS ARE CLOSELY HELD WITHIN THE EXECUTIVE BRANCH AND THEY ARE NOT ROUTINELY PROVIDED TO CONGRESS.

IT HAS BEEN THE EXPERIENCE OF THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE THAT WE RARELY ARE AWARE OF THE EXISTENCE OF SPECIFIC NSDDs. SELECTED DOCUMENTS OF THIS CATEGORY HAVE ON OCCASION BEEN MADE AVAILABLE FOR REVIEW AT THE WHITE HOUSE WHEN WE HAVE HEARD OF THEM AND ASKED ABOUT THEM, BUT SUCCESSIVE ADMINISTRATIONS HAVE SOUGHT TO WITHHOLD OTHERS OR TO DENY ROUTINE ACCESS TO THEM ON THE GROUNDS THAT THEY ARE PRESIDENTIAL DOCUMENTS - WHATEVER THAT MEANS. ALTHOUGH THERE

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HAVE NOT BEEN MANY COMMUNICATIONS BETWEEN THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE AND THIS ADMINISTRATION ON THE SUBJECT, IT IS MY IMPRESSION, BASED ON WHAT WE DO KNOW, THAT OFFICIALS OF THE NATIONAL SECURITY COUNCIL AND OTHER OFFICIALS OF THE PRESIDENT'S STAFF CONSIDER THEM TO BE COVERED BY THE DOCTRINE OF EXECUTIVE PRIVILEGE.

WHILE IT IS NOT MY PURPOSE TO EITHER DEFINE OR DEBATE WHAT THAT DOCTRINE MAY ENCOMPASS, I HAVE ALWAYS UNDERSTOOD THAT EXECUTIVE PRIVILEGE HAS BEEN ASSERTED MOST OFTEN TO COVER ADVICE RECEIVED BY THE PRESIDENT FROM HIS SUBORDINATES AND THE DETAILS OF INTERNAL EXECUTIVE BRANCH CONSIDERATION OF POLICY OPTIONS. I HAVE RARELY HEARD IT SERIOUSLY ADVANCED AS COVERING

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DIRECTIVES FROM THE PRESIDENT SETTING FORTH POLICY AND INSTRUCTING EXECUTIVE BRANCH OFFICIALS ON HOW TO IMPLEMENT THAT POLICY. THAT IS WHY I BELIEVE THAT, INSOFAR AS THIS LEGISLATION TOUCHES ON NSDDs OR THEIR LIKE, IT IS AN IMPORTANT STEP FORWARD IN EXECUTIVE BRANCH ACCOUNTABILITY TO CONGRESS FOR NATIONAL SECURITY POLICY DECISIONS.

UNDER THE CONSTITUTION, CONGRESS SHARES AUTHORITY WITH THE PRESIDENT IN THE MAKING OF FOREIGN POLICY. AS A PRACTICAL MATTER, 535 MEMBERS OF CONGRESS CANNOT AGREE ON EVERY DECISION MADE BY A PRESIDENT. THAT IS WHY WE HAVE A CHIEF EXECUTIVE WHO MUST MAKE MOST DECISIONS AND WHO MUST CARRY THEM OUT. BUT, THE PRESIDENT'S RESPONSIBILITY DOES INCLUDE KEEPING CONGRESS

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INFORMED OF WHAT HE IS DOING. IT INCLUDES LISTENING TO THE  
ADVICE HE MAY RECIEVE FROM CONGRESS FROM TIME TO TIME. HIS  
POWER TO ACT CAN BE CIRCUMSCRIBED BY STATUTE AND BY THE  
AVAILABILITY OF FUNDS. AS A PRACTICAL MATTER, IT CAN ALSO BE  
CIRCUMSCRIBED BY THE LACK OF PUBLIC SUPPORT FOR HIS DECISIONS.  
FOR ALL THESE REASONS, CONGRESS MUST BE APPRISED OF WHAT A  
PRESIDENT IS DOING, EVEN IN THE CASE OF SENSITIVE NATIONAL  
SECURITY MATTERS.

FURTHER, WHAT WE DO KNOW OF NSDDs SUGGEST THEY SHOULD BE OF  
DIRECT CONCERN TO CONGRESS. THEY MAY SET MAJOR POLICY  
DECISIONS. AS INSTRUCTIONS GIVEN TO EXECUTIVE BRANCH OFFICIALS  
WHO ARE TO IMPLEMENT THEM, THEY ARE SOMETIMES THE ONLY RECORD

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OF SECRET POLICY AND SOMETIMES ARE A SIGNIFICANT CHECK ON THE  
AUTHORITY OF INDIVIDUAL EXECUTIVE BRANCH OFFICIALS.

FINALLY, THEY REPRESENT INFORMATION WHICH CONGRESS SIMPLY  
MUST HAVE IN THE AREA OF NATIONAL SECURITY IF IT IS TO HAVE A  
NATIONAL SECURITY ROLE. IS THE SECRET POLICY OF THE UNITED  
STATES THE SAME AS THE PUBLIC POLICY OF THE UNITED STATES?  
AND, EXACTLY WHAT IS THE POLICY OF THE UNITED STATES WITH  
RESPECT TO VERY SENSITIVE MATTERS SUCH AS TERRORISM,  
PARAMILITARY COVERT ACTIONS, ETC.?

WHAT I THINK THESE QUESTIONS AND OUR GENERAL UNDERSTANDING  
OF NSDDs TELL US IS THAT THEY ARE SIGNIFICANT DOCUMENTS AND

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ONES WHICH CONGRESS SHOULD REGULARLY REVIEW IN ITS OVERSIGHT OF NATIONAL SECURITY ACTIVITY. NOW, IT CAN BE SAID AND OUGHT TO BE SAID THAT SOME NSDDs WILL BE VERY SENSITIVE. THAT IS WHY I THINK IT IS FULLY APPROPRIATE THAT H.R. 5092 REQUIRES THAT THE RULES AND THE PROCEDURES OF EACH HOUSE FOR THE PROTECTION OF SENSITIVE INFORMATION APPLY IN ANY TRANSMISSION AND RETENTION BY COMMITTEES OF CONGRESS OF CLASSIFIED NSDDs.

I ALSO AGREE WITH THE PROVISION OF SUBSECTION 2(A) WHICH EXCLUDES FROM THE DEFINITION OF "EXECUTIVE DIRECTIVE" PRESIDENTIAL FINDINGS UNDER THE HUGHES-RYAN AMENDMENT.



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MR. CHAIRMAN, I HAVE ONLY TWO SUGGESTIONS WITH RESPECT TO SECTION 2 OF THE BILL. THE FIRST IS MORE BY WAY OF A QUESTION. DOES SUBSECTION 2(B)(1) TAKE APPROPRIATE PRECAUTIONS FOR THE PROTECTION OF SENSITIVE NSDDs THAT MUST BE PROVIDED TO THE OFFICE OF THE FEDERAL REGISTER? WOULD IT NOT BE MORE APPROPRIATE TO REQUIRE THE RETENTION OF CERTIFIED COPIES OF THESE DOCUMENTS BY AN INDEPENDENT EXECUTIVE BRANCH OFFICIAL WITHIN THE NATIONAL SECURITY ESTABLISHMENT OF THE GOVERNMENT UNTIL SUCH TIME AS THEY WOULD BE ORDINARILY PROVIDED TO THE ARCHIVES?

MY SECOND POINT IS ONLY TO REEMPHASIZE AN EARLIER COMMENT. I BELIEVE THAT IT MAY BE POSSIBLE TO IMPROVE UPON THE LANGUAGE

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IN SUBSECTION 2(B)(2) IN ORDER TO MORE CLEARLY SET FORTH PROTECTIONS FOR NSDDs PROVIDED TO CONGRESS, POSSIBLY INCLUDING A PROVISION WHICH PERMITS THE TRANSMISSION DIRECTLY TO COMMITTEES OF JURISDICTION AND OF ONLY THOSE PARTS OF AN NSDD RELATING TO EACH COMMITTEE'S SPECIFIC JURISDICTIONAL INTEREST. I HAVE BEEN TOLD, FOR INSTANCE, THAT SOME NSDDs MAY COVER A RANGE OF TOPICS WHICH, UNDER OUR SYSTEM, WOULD RESULT IN REFERRALS OF THE SAME DOCUMENT TO A NUMBER OF COMMITTEES. YET, THE MATERIAL IN SUCH DOCUMENTS COULD BE SEGREGATED DEPENDING ON THE JURISDICTION OF THE COMMITTEES INVOLVED SO THAT ONLY THOSE MATTERS WOULD BE PROVIDED TO A PARTICULAR COMMITTEE WHICH DEALT WITH ITS JURISDICTIONAL CONCERN.

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MR. CHAIRMAN, IN CLOSING I WOULD LIKE TO EXPRESS MY  
SUPPORT FOR THE EFFORT YOU HAVE LAUNCHED WITH H.R. 5092. IT IS  
MY HOPE THAT IN YOUR HEARINGS YOU WILL HEAR FROM THE EXECUTIVE  
BRANCH A BETTER EXPLANATION THAN I MYSELF HAVE HEARD OVER THE  
PAST SEVERAL YEARS AS TO WHY NSDDs OR SIMILAR DOCUMENTS ARE NOT  
ROUTINELY PROVIDED TO CONGRESS UNDER APPROPRIATE SECURITY  
CONDITIONS. I DO NOT UNDERSTAND THE APPROACH WHICH DENIES THEM  
TO CONGRESS ON THE BASIS OF SOME RESERVATION OF EXECUTIVE  
AUTHORITY. INsofar AS THESE DOCUMENTS SET THE POLICY OF THE  
UNITED STATES GOVERNMENT AND PROVIDE DIRECTION TO EXECUTIVE  
BRANCH OFFICIALS, I BELIEVE IT IS FULLY APPROPRIATE THAT  
CONGRESS REVIEW THEM.

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MR. CHAIRMAN, I THANK YOU FOR THE OPPORTUNITY TO TESTIFY  
BEFORE THE SUBCOMMITTEE AND I AM AVAILABLE TO ANSWER ANY  
QUESTIONS.